91-955

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

BARBARA PROPST,

Petitioner,

vs.

MORTON W. WEIR, JUDITH S. LIEBMAN, and ROBERT M. BERDAHL,

Respondents.

Petition For A Writ Of Certiorari To The Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Rankin v. McPherson*, 483 U.S. 378 (1987), require a showing of *actual* disruption in the work place as a result of an employee's speech before a State may constitutionally move that employee from her position in retaliation for having spoken out on matters of public concern?

2. Under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Mitchell v. Forsythe*, 472 U.S. 511 (1985), is a Defendant's subjective belief that an employee's speech has caused disruption in the work place, a proper basis upon which the Court can grant summary judgment on the affirmative defense of qualified immunity prior to the Plaintiff being afforded any opportunity for discovery?

3. Must a Plaintiff produce "specific, nonconclusory factual allegations" of a Defendant's intent or motivation, prior to being afforded discovery in order to defeat a Defendant's request for summary judgment on the affirmative defense of qualified immunity?

4. Did the Court of Appeals for the Seventh Circuit err in reversing the District Court's denial of summary judgment on the affirmative defense of qualified immunity?

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Petition For A Writ Of Certiorari To The Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Barbara Propst, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit, entered in the above entitled proceeding on July 15, 1991.

OPINIONS BELOW

The September 4, 1991, Order of the United States Court of Appeals for the Seventh Circuit, denying Petitioner's request for rehearing, is unreported, but is reprinted in the Appendix hereto, at App. 39-40. The opinion of the United States Court of Appeals for the

Seventh Circuit, which reversed the District Court's denial of the Respondents' Summary Judgment Motion, is reported at 937 F.2d 338, and is reprinted in the Appendix hereto at App. 24-38. The District Court denied Respondent's Motion for Summary Judgment on the issue of qualified immunity in an Order filed May 3, 1990. That Order is unreported, but is appendixed here at pages App. 1-11.

JURISDICTION

In response to Petitioner's Complaint for damages and injunctive relief, the Respondents filed a Motion to Dismiss her claims based on Illinois State Law, and a Motion for Summary Judgment on the affirmative defense of qualified immunity on her claim brought under 42 U.S.C. § 1983. On May 3, 1990, the District Court of the Central District of Illinois – Springfield Division (Mills, J.), entered an Order dismissing Petitioner's State Law Claims, and denying Respondents' Motion for Summary Judgment on the issue of qualified immunity. On July 15, 1991, the United States Court of Appeals for the Seventh Circuit, reversed the District Court's denial of Summary Judgment as to Respondents Morton W. Weir, Judith S. Liebman, and Robert M. Berdahl, in cause number 90-2093. A final Order denying the Petitioner's request for rehearing, was entered by the Court on September 4, 1991.

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit, is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983.

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States Constitution Amendment 14, § 1.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Barbara Propst, brought this action in the Circuit Court of Champaign County, Illinois, as a result of the Respondents having removed her from her position of employment at the University of Illinois in retaliation for having spoken out on matters of public concern. Her Complaint contained claims under Illinois State Law, and a claim under Title 42 U.S.C. § 1983 and the Fourteenth Amendment to the Constitution of the United States.

The Respondents removed the Plaintiff's State Court action to the District Court for the Central District of Illinois, under Title 28 U.S.C. § 1331, as to Petitioner's § 1983 claims, and as to Petitioner's State Law claim, the Respondents asserted that the Court had pendant jurisdiction.

Barbara Propst was the Assistant Director of the Computer Based Education and Research Laboratory (CERL) at the University of Illinois until November of 1987 when she was removed from that position by the Respondents.

During her tenure as the Assistant Director at CERL, Barbara Propst became aware of the misuse and conversion of funds, and property, belonging to the University of Illinois, by the Director of CERL, Donald Bitzer. More specifically, Barbara Propst raised concerns, and complained of, the diversion of University assets without appropriate documentation, the financing of private business trips with University funds, the altering of University travel vouchers, and the use of University personnel on University time, and at University expense, to perform services for a company founded by Donald Bitzer, and of

which he was the primary shareholder (University Communications, Inc.).

In January of 1987, the decision was made to remove Barbara Propst from her position at CERL. When concerns were raised as to whether the removal of Barbara Propst from her position could be interpreted as firing a "whistle blower", and advice was sought, the University's Legal Counsel's Office advised that the proposed termination letter would be "worth a million dollars" to the Propsts. The removal decision was then temporarily rescinded.

In November of 1987, Barbara Propst was removed from her position at CERL.

Subsequent to her removal from her position at CERL, Barbara Propst filed suit in the Circuit Court of Champaign County, Illinois, under, inter alia, 42 U.S.C. § 1983, and the Fourteenth Amendment to the Constitution of the United States. After removing the case from State Court to the United States District Court for the Central District of Illinois, and prior to any discovery, the Defendants filed a Motion for Summary Judgment alleging that they were entitled to summary judgment on the basis of qualified immunity.

The United States District Court examined Plaintiff's Complaint in light of this Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968), denied the Respondents' Motion for Summary Judgment, and held that there were genuine issues of material fact related to the *actual* effect of the Petitioner's speech on office discipline and harmony, and genuine issues of material fact as to

her ability to perform her duties after having spoken out on these matters of public concern.

Respondents, Morton W. Weir, Judith S. Liebman, and Robert M. Berdahl, filed a timely appeal to the United States Court of Appeals for the Seventh Circuit, and advanced the argument rejected by the District Court – that whether there is actual disruption in the work place, and whether there is any actual impact on Petitioner's ability to perform her job as a result of having spoken out – is irrelevant because the Respondents reasonably believed that there was disruption at CERL, and that that *perceived* disruption justified the removal of Barbara Propst from her position thereat.

The United States Court of Appeals for the Seventh Circuit reversed the District Court's denial of Summary Judgment, and adopted the Respondents' argument.

> The question is not what the conditions in the laboratory were; it is what the Administrator's reasonably believed them to have been . . . conditions in the laboratory are not relevant; the inquiry must focus on what the Defendants knew, and whether reasonable persons in their position would have believed their actions proper given the State of the Law in 1987. (Opinion at page 8).

Barbara Propst requested rehearing, and suggested that that rehearing be held in banc, as a result of: (1) the Court having rejected the requirement imposed by *Pickering*, that there be actual disruption in the work place, and that that disruption outweigh the plaintiff's First Amendment rights, and (2) as a result of the Court having interjected the Defendants' subjective beliefs into the

qualified immunity analysis in contravention of this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Mitchell v. Forsythe*, 472 U.S. 511 (1985).

The Court of Appeals denied the request for rehearing.

In its opinion, the Seventh Circuit noted that it was being forced to address the question which this Court had "ducked" in *Siegert v. Gilley*.

> The Supreme Court granted certiorari in *Siegert v. Gilley*, to address that question, but ducked, concluding that the Plaintiff had not stated a claim on which relief may be granted. Although the Court avoided decision for the moment, we cannot. (Opinion at 10).

The Respondents did not argue in either the District Court, or the Court of Appeals, that the matters raised by the Petitioner were not matters of public concern, nor did they argue that the law had not been clearly established at the time of the conduct complained of. The argument advanced in both the District Court, and in the Seventh Circuit Court of Appeals, is that the District Court had erred in focusing on the *actual conditions* at the Computer Based Education Research Laboratory, rather than on the Respondents' beliefs concerning those conditions.

ARGUMENT

In *Pickering*, this Court recognized that the State, as an employer, may have an interest in regulating the speech of its employees, in order to promote the efficiency of the public services which it performs through

those employees. The problem, this Court noted in *Pickering:*

> "Is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees". (At 568)

In holding that the interest of the school administration did not outweigh Pickering's freedom of speech, this Court focused on the fact that there had been no showing that Pickering's performance of his daily duties in the class room, nor the regular operation of the school generally, had been so effected by Pickering's statements, that the State's interest in promoting efficiency in operating the Government outweighed Pickering's right to freedom of speech.

This Court next considered the necessity of balancing the employer's interests against the employee's interest in *Rankin v. McPherson*, 483 U.S. 378 (1987), 107 S.Ct. 2891.

This Court, in *Rankin*, characterized the relevant inquiry to be as follows:

> The determination whether a public employer has properly discharged an employee for engaging speech requires "a balance between the interests of the [employee], as a citizen in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 30 L.Ed.2d 811 (1968); *Connick v.*

> *Myers*, 461 U.S. 138, 140, 103 S.Ct. 1684, 1686, 75 L.Ed.2d 708 (1983) . . .

After finding that McPherson's statement addressed a matter of public concern, this Court stated that the next inquiry it must make under *Pickering*, is whether the State's interest in maintaining its efficiency in providing public services, outweighed the employee's First Amendment rights. In finding in favor of the employee, this Court noted (at 2899) that there was no evidence that the statements had interfered with the efficient functioning of the office. There had been no inquiry on the question of to whom McPherson's statements had been conveyed. This Court held that:

> Where, as here, an employee serves no confidential policy making, or public contact role, the danger to the agency's successful function from that employee's private speech is minimal. (At 2900).

In compliance with the mandates of this Court's decision in *Pickering* and *Rankin*, other panels of the Seventh Circuit Court of Appeals, have consistently held that under a *Pickering* analysis, there must be proof of *actual disruption* in the work place, and additionally, a finding that that actual disruption outweighs the Plaintiff's First Amendment Rights. (See, e.g., *Conner v. Reinhard*, 847 F.2d at 384 (7th Cir. 1988)); *Greenburg v. Kmetko* (7th Cir. 1991), 922 F.2d 382, at 384; *Hostrop v. Board of Junior College District #515*, 471 F.2d 488, 492 (7th Cir. 1972); *Ohse v. Hughes*, 816 F.2d 1144 (7th Cir. 1987); *Egger v. Phillips*, 669 F.2d 497 (7th Cir. 1972); (see also *Zamboni v. Stamler*, 847 F.2d 73 (3rd Cir. 1988).

> Defendant must show evidence of the *actual* effects of Plaintiff's speech before the Court will find that the employer was justified. (*Conner*, at 391).

The panel decision in this case, rejects this Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968); and *Rankin v. McPherson*, 483 U.S. 378 (1987), and the precedent established by the Seventh Circuit cases cited above by explicitly rejecting any inquiry into what the actual working conditions in the laboratory were, and instead focusing solely upon what the administrators "reasonably believed" those conditions to have been.

> When denying the administrators' Motion for Summary Judgment against Franklin Propst, the District Court concluded that the cause and extent of breakdown and the lab's functioning are genuine issues of material fact. The Court adopted that reasoning without further elaboration in Barbara Propst's case. Yet the question is not what the conditions in the laboratory *were;* it is what the administrators reasonably believe them to have been . . . conditions in the laboratory are not relevant. (at page 8)

By focusing on a Defendants' subjective belief in granting summary judgment on the issue of qualified immunity, the Court of Appeals has interjected into the qualified immunity analysis, the subjective component which this Court rejected in *Harlow v. Fitzgerald*, 457 U.S 800 (1982), *Mitchell v. Forsythe*, 472 U.S. 511 (1985), and *Siegert v. Gilley*, 111 S.Ct. 1789 (1991).

> We have on several occasions, addressed the proper analytical frame work for determining whether a Plaintiff's allegations are sufficient to

> overcome a Defendant's defensive qualified immunity asserted in a Motion for Summary Judgment. Qualified immunity is a defense that must be pleaded by a Defendant official, *Gomez v. Toledo*, 446 U.S. 635, 100 Sup.Ct. 1920, 64 Ill.Ed. 2d 572 (1980); *Harlow*, 457 U.S. at 815, 102 S.Ct., at 2736-2737. Once a Defendant pleads a defense of qualified immunity, "[On] summary judgment, the Judge may appropriately determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. . . . until this threshold immunity question is resolved, discovery should not be allowed" id., at 818, 102 S.Ct. at 2738, *Siegert v. Gilley*, 111 S.Ct. 1789 (1991).

Because the purpose of the qualified immunity defense is to weed out those cases which fail from a purely legal standpoint, discovery is generally not necessary.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court stated:

> On summary judgment, the Judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to know that the law forbade conduct not previously identified as law. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity

> defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. [At 818-819).

These principles were reiterated in *Mitchell v. Forsythe*, 472 U.S. 511 (1985):

> An Appellate Court reviewing the denial of the Defendant's claim of immunity, need not consider the correctness of the Plaintiff's version of the facts, nor even determine whether the Plaintiff's allegations actually state a claim, All it need determine is a question of law: whether the legal norms allegedly violated by the Defendant were clearly established at the time of the challenged actions, or in cases where the District Court has denied summary judgment for the Defendant on the ground that even under the Defendant's version of the facts, the Defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the Defendant claims he took. (At 528).

Additionally, the Seventh Circuit decision in this case, places it in direct conflict with the decisions of other panels from that same Court. In *Auriemma v. Rice*, 910 F.2d 1449 (7th Cir. 1990), the Court recognized that under *Harlow*, an objective immunity analysis at the summary judgment stage, prior to discovery, does not include an evaluation of intent (at 1452).

> The objective determination in these cases requires that Courts not consider intent when making the final determination at summary judgment of whether the law is clearly established . . . (at 1453).

The sole inquiry which should have been made by the Court of Appeals in this case, was whether the law was clearly established at the time of the conduct complained of in November of 1987. Since this issue was not raised by the Respondents, the judgment of the District Court should have been affirmed.

In *Breuer v. Hart*, 909 F.2d 1035 (7th Cir. 1990), the Court recognized that a *Pickering* analysis is different from, and distinct from, a qualified immunity analysis.

> Because we affirmed the District Court on the disruption ground we do not reach either the qualified immunity defense under *Harlow v. Fitzgerald*, 457 U.S. 800, raised by the Defendant, or consideration of the motivation factor discussed in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-287 (Employer may justify disciplinary action by showing action, would have been taken even in the absence of "whistle blowing" activity).

The Seventh Circuit in this case went beyond the limited inquiry envisioned by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and those cases which have followed and reaffirmed it, and then purported to engage in a *Pickering* analysis while rejecting *Pickering's* requirement that there be a showing of *actual* disruption.

Prior decisions from the Seventh Circuit Court of Appeals have consistently recognized that the only inquiry before the Court, on appeal from a denial of qualified immunity, is a legal issue, and not one in which factual allegations will be weighed or determined. (See, e.g., *Conner v. Reinhard*, 847 F.2d 384 (7th Cir. 1988); *Wade v. Hegner*, 804 F.2d 67, 70 (7th Cir. 1986); *Green v. Carlson*,

826 F.2d 647, 652 (7th Cir. 1987); *Landstrom v. Illinois Dept. of Children and Family Services*, 892 F.2d 670 (7th Cir. 1990); *Rakovich v. Wade*, 850 F.2d 1180, 1205 (7th Cir. 1988) (see also *Martin v. D.C. Metro Police Department*, 812 F.2d 1425, 1433). The Court has also reaffirmed that intent is irrelevant in reviewing a District Court's denial of summary judgment on the issue of qualified immunity. (See *Wade v. Hegner* (7th Cir. 1986), 804 F.2d 67, 69).

The deposition testimony from a related case revealed that none of the Respondents were aware of any ways in which the Computer Based Education Research Laboratory Research Laboratory, was not operating properly. At the time the Petitioner was removed from her position at CERL, there were over 125 people employed there. In fact, Robert M. Berdahl testified in a related case, that as of the time the decision was made to remove Barbara Propst from her position in January of 1987, there had been no discussion whatsoever regarding the effectiveness with which the laboratory was operating.

Should this Court elect to overrule its decisions in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); and *Mitchell v. Forsythe*, 472 U.S. 511 (1985), and interject into the qualified immunity analysis issues pertaining to a Defendants' belief, a Plaintiff must be afforded an opportunity to conduct discovery, not only of the Defendant, but also of those persons upon whom the Defendant claims to rely in forming that belief.

The decision in this case confuses the issues of qualified immunity, *before discovery*, with the principles pronounced by this Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968); and *Rankin v. McPherson*, 483 U.S. 378

(1987), and then eviscerates the balancing test which underlies the *Pickering* decision by explicitly rejecting any inquiry into whether there was any actual disruption in the work place as a result of the Petitioner's speech.

If a Plaintiff is to be precluded from conducting discovery prior to the Court ruling on the affirmative defense of qualified immunity, the inquiry must be limited to whether the law at issue was clearly established at the time of the conduct complained of. The balancing of the competing interests of the State, and of the employee, as required by *Pickering*, is appropriate only after a Plaintiff has been afforded an opportunity to engage in discovery. A Defendant's subjective belief, reasonable or not, is irrelevant for purposes of a Defendant's qualified immunity, as well as for purposes of balancing the competing interests of the State and Employee under *Pickering*.

CONCLUSION

For all of the foregoing reasons, this Petition for Certiorari should be granted. This Court's intervention is necessary in order to reaffirm the principles previously pronounced in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Mitchell v. Forsythe*, 472 U.S. 511 (1985), *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Rankin v. McPherson*, 483 U.S. 378 (1987), and to afford your Petitioner her entitlement to proceed to trial.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS -
SPRINGFIELD DIVISION

BARBARA PROPST, Plaintiff,	)	NO. 89-3254
v.	)	
DONALD L. BITZER, et al., Defendants.	)	

ORDER

(Filed May 3, 1990)

This cause is before the Court on the defendants' joint motion to dismiss Counts II and III of the plaintiff's complaint. In addition, all of the defendants have moved for summary judgment on Count I of the complaint. The plaintiff has responded to each of these motions and they are ripe for ruling. We now undertake the task.

I. Facts

During the relevant time period, Plaintiff was employed by the Board of Trustees of the University of Illinois in the computer based education research laboratory (CERL). Defendant Bitzer was the director of CERL and the person to whom Plaintiff ultimately reported in conjunction with her duties. Defendant Weir was Vice-President of the University and interim chancellor. Defendants Liebman and Berdahl were Vice-Chancellors of the University of Illinois. Plaintiff sues each of the defendants in their individual capacities and not as agents or officers of the State of Illinois.

Plaintiff asserts that in the course of her employment, she discovered that Defendant Bitzer had misused and converted University property to his private benefit and gain. Plaintiff brought these matters to the attention of her immediate supervisor. As a result of Plaintiff's action, an audit of CERL was conducted. Plaintiff asserts that the audit confirmed what she had uncovered.

In response to her speaking out on these matters of public concern, Plaintiff asserts, she was removed from her position at CERL. Plaintiff does not allege, however, that she was discharged from her employment with the Board of Trustees of the University of Illinois.

II. Motion to Dismiss Standard of Review

When reviewing a motion to dismiss for failure to state a claim, the Court must accept as true all material facts well pleaded in the complaint, and must make all reasonable inferences in a light most favorable to the plaintiff. *City of Milwaukee v. Saxbe*, 546 F.2d 693, 704 (7th Cir. 1976). A complaint may be dismissed for failure to state a claim only if the plaintiff can prove no set of facts which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957). The complaint must contain either direct or inferential allegations concerning all of the material elements necessary for recovery under the relevant legal theory. *Carl Sandburg Village Condominium Association v. First Condominium Development Co.*, 758 F.2d 203, 207 (7th Cir. 1977). The Court, however, need not strain to find inferences available to the plaintiff that are not apparent on the face of the complaint. *Coates v. Illinois State Board of Education*, 559 F.2d 445, 447 (7th Cir. 1977).

Applying the above standards, the Court now turns to the pending motion to dismiss.

III. Joint Motion to Dismiss Counts II and III

Count II of Plaintiff's complaint purports to be brought pursuant to Ill. Const. art. I, § 4. Count III purports to be a cause of action for wrongful discharge. All of the defendants have moved to dismiss both counts.

A. Count II

In Count II of her complaint, Plaintiff asserts a cause of action for deprivation of her right to freedom of speech, in violation of article I, § 4 of the Constitution of the State of Illinois. That section provides that "[a]ll persons may speak, write and publish freely, being responsible for the abuse of that liberty." Plaintiff asserts that in retaliation for her exercise of her right to speak out on matters of public concern, the defendants removed her from her position at CERL.

Defendants assert that Count II must be dismissed because the guarantee of free speech referred to in art. I, § 4 of the Illinois constitution is a guarantee only against governmental infringement of the right to free speech. Plaintiff asserts that she was employed by the Board of Trustees of the University of Illinois. She does not allege that she was employed by any of the individual defendants. Each of the defendants is named solely in his or her individual capacity. Thus, Defendants assert, Count II fails to state a claim for damages.

In *Barr v. Kelso-Burnett Co.*, 106 Ill.2d 520, 526 (1985) the Illinois supreme court stated that "It is well established that the constitutional guarantee of free speech is only a guarantee against abridgement by the government, Federal or State; the Constitution does not provide protection or redress against private individuals or corporations which seek to abridge the free expression of others." The plaintiffs in *Barr* were eight foremen at the construction of the Clinton nuclear power plant. They alleged that their right to free speech as guaranteed by the first amendment to the United States Constitution and by art. I, § 4 of the Illinois constitution as violated by the termination of their employment. The Illinois Supreme Court reversed the decision of the circuit court of St. Clair County denying the defendant's motion to dismiss for failure to state a claim remanded with directions to enter an appropriate order dismissing the complaint. From this decision it is clear that Illinois does not recognize a cause of action under art. I, § 4 of the Illinois constitution for infringement by a non-governmental actor of the right to free speech.

This holding is supported by a case decided by a sister district court in this circuit. In *Miller v. State of Illinois*, 681 F.Supp. 538, 547 (N.D.Ill. 1988), the court stated that *Barr* involved a private employer and that the Illinois Supreme Court stressed that the first amendment to the United States Constitution is directed only to governmental actors. The court went on to state that where the employer is a governmental actor, there is no doubt that Illinois would regard the first amendment and art. I, § 4 of the Illinois constitution as establishing a clearly

mandated public policy against abridgement of free speech. *Id.*

In her response to the motion to dismiss, Plaintiff states that she is perplexed by the defendant's citation of *Miller* but does not state why she is perplexed. Perhaps it is because *Miller* provides additional authority damaging to her case. In any event, we do not share her confusion. We are quite sure that Count II must be dismissed.

Art I, § 4 of the Illinois constitution is a guarantee against abridgement by the government of the right to free speech. In this case, Plaintiff is suing the defendants in their individual capacities and not as state agents or officials. Thus, Count II must be dismissed for failure to state a claim.

B. Count III

Count III of the complaint attempts to state a claim for wrongful discharge. Plaintiff asserts that in retaliation for her exercise of free speech, she was removed from her position at CERL. This violates a public policy of the State of Illinois, Plaintiff asserts, and is thus actionable as constituting a wrongful or retaliatory discharge.

Count III must be dismissed for at least two reasons. First, as we stated in the order dismissing the retaliatory discharge claim brought in Plaintiff's husband's case, "Illinois law requires that an action for retaliatory discharge be brought against the Plaintiff's employer, which here would be the Defendants in their official capacities, not as individuals." *Propst v. Bitzer,* No. 88-3005 (C.D. Ill. Sept. 8, 1988) (order dismissing the plaintiff's retaliatory

discharge claim). In this cause, Plaintiff sues the defendants in their individual capacities only. Thus, her retaliatory discharge claim suffers from the same defect as her husband's.

Second, again as we stated in ruling on the same claim by Plaintiff's husband, "to bring an action for retaliatory discharge in Illinois, Plaintiff must at the very least prove that [she] was discharged." *Id.* Plaintiff can not make this showing.

1. Action Against Employer?

We find that under Illinois law, an action for retaliatory discharge must be brought against a plaintiff's employer. In this cause that would be the Board of Trustees of the University of Illinois. Thus, Plaintiff's claim against these Defendants in their individual capacities must be dismissed.

In *Morton v. Hartigan*, 145 Ill. App. 3d 417 (1st Dist. 1986), the appellate court affirmed the trial court's dismissal of the plaintiff's complaint against his supervisors in the state Attorney General's office because the complaint named the defendants as individuals and not as officers of the state. Furthermore, in *Barr v. Kelso-Burnett Co.*, 106 Ill. 2d 520, 525 (1985), the Illinois Supreme Court expressed a policy against expanding the retaliatory discharge tort. Based on the foregoing, we believe the law in Illinois to be that a plaintiff cannot properly sue his supervisors for retaliatory discharge.

Plaintiff relies on a recent case from the Illinois Second District Appellate Court and a case from the Northern District of Illinois in support of the proposition that Count III states a claim. In *Fellhauer v. City of Geneva*, 190 Ill.App.3d 592 (2nd Dist. 1989) the court disagreed with *Morton* and held that a cause of action for retaliatory discharge can be brought against not only the plaintiff's employer but also against the plaintiff's supervisor, co-employee or agent of the employer who commits the act of retaliatory discharge. Also, in *Zurek v. Hasten*, 553 F.Supp. 745, 749 (N.D.Ill. 1982), the court held that the plaintiff's claim for retaliatory discharge against his supervisors was sufficient to survive a motion to dismiss.

The *Zurek* holding was recently repudiated by the Northern District in favor of the First District Illinois Appellate Court holding in *Morton*. *Miller v. State of Illinois*, 681 F.Supp. 538, 547 n. 18 (N.D.Ill. 1988). Additionally, based on the Illinois Supreme Court's admonition in *Barr* against expanding the tort of retaliatory discharge and the holding of *Morton v. Hartigan*, we believe the law in Illinois to be that a plaintiff can sue only his employer and not a supervisor, co-employee or agent of the employer for retaliatory discharge. Count III of the complaint is insufficient.

2. Discharge?

A second basis for dismissing Count III is that Plaintiff cannot show that she was discharged from her employment. Plaintiff merely alleges that she was removed from her position at CERL. She then proceeds to argue that she was constructively discharged. We find,

however, that Illinois does not recognize constructive retaliatory discharge.

In *Veit v. Village of Round Lake Park*, 167 Ill.App.3d 350 (2nd Dist. 1988), the plaintiff alleged that he was transferred to a less desirable position in the village police department in retaliation for his making claims under the Workers' Compensation Act. The Illinois appellate court refused to recognize the existence of the tort of retaliatory harassment. Furthermore, although Plaintiff argues that it is an open question whether Illinois courts would recognize the tort of constructive retaliatory discharge, we believe that Illinois case law supports Defendant's position that the Illinois courts do not recognize such a cause of action. *See Grey v. First National Bank of Chicago*, 169 Ill. App. 3d 936 (1st Dist. 1988); *Bryce v. Johnson & Johnson*, 115 Ill. App. 3d 913 (1st Dist. 1983). *See also Hinthorn v. Roland's of Bloomington, Inc.*, 119 Ill. 2d 526, 531 (1988) (Illinois Supreme Court stated that it wished to make it abundantly clear that it was not endorsing the constructive discharge concept). Count III of Plaintiff's complaint must be dismissed. We now turn to the motions for summary judgment.

IV. Summary Judgment Standard

Under Fed. R. Civ. P. 56(c), summary judgment should be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that the moving party is entitled to a judgment as a matter of law." Unquestionably, in determining whether a genuine issue of material fact exists, the evidence is to be taken in the light most

favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Nevertheless, the rule is also well established that the mere existence of some factual dispute will not frustrate an otherwise proper summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A party seeking summary judgment bears the initial responsibility of informing the district court of the basis for his motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, admissions, and affidavits which he believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the movant has made a properly supported motion, the non-movant has the responsibility of going beyond the pleadings and setting forth specific facts that demonstrate the existence of a genuine issue of fact for trial. *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 567 (7th Cir. 1989). A material fact is one that is "outcome determinative under the governing law." *Shlay v. Montgomery*, 802 F.2d 918, 920 (7th Cir. 1986) (quoting *Egger v. Phillips*, 710 F.2d 292, 296 (7th Cir.) *cert. denied*, 464 U.S. 918 (1983)). The fact is genuinely disputed when the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248. Thus, the non-movant must produce proper documentary evidence to support his contentions. *Howland v. Kilquist*, 833 F.2d 639, 642 (7th Cir. 1987). Applying the above standards the Court now turns to the pending motions for summary judgment.

V. Motions for Summary Judgment

All of the defendants have moved for summary judgment asserting they are entitled to the benefits of

qualified immunity. In addition, Defendant Bitzer asserts that he took no action that led to the removal of Plaintiff from her position at CERL.

A. Qualified Immunity

The Court has previously undergone an extensive discussion of the applicable law and applied that law to facts nearly identical to those in the present case. *See Propst v. Bitzer*, No. 88-3005 (C.D. Ill. Jan. 29, 1990) (order denying motions for summary judgment). Based on the same analysis as was done in ruling on the motions for summary judgment in that case, the Court finds that genuine issues of material fact exist. Thus, the motion for summary judgment filed on behalf of Defendants Weir, Liebman, and Berdahl must be denied. Likewise, the motion for summary judgment filed on behalf of Defendant Bitzer must be denied insofar as it requests summary judgment based on qualified immunity.

B. Bitzer's Involvement

Defendant Mitzer also moves for summary judgment asserting that he took no action that led to the removal of Plaintiff from her position at CERL. Bitzer asserts that Plaintiff's removal took place as a result of the action of Defendants Weir, Liebmann, and Berdahl. Because he was not a participant in nor had any authority in the decision making process that resulted in Plaintiff's removal, Bitzer asserts, there could be no finding that he violated any of Plaintiff's constitutional rights. Thus, Defendant Bitzer

asserts, he is entitled to summary judgment on Count I of the complaint which is based on 42 U.S.C. § 1983.

Plaintiff, in her response to Bitzer's motion for summary judgment, asserts that no discovery has been conducted in this case and that the Court should hold the motion for summary judgment in abeyance until Plaintiff has had the opportunity to conduct discovery relevant to Bitzer's involvement in her removal from CERL. We think this an appropriate solution. The motion for summary judgment will be denied at this time with leave to renew it after discovery relevant to the issue raised in the motion has been conducted.

Ergo, for the reasons discussed above, the joint motion to dismiss Counts II and III (d/e 15) is ALLOWED. The motion for summary judgment on Count I filed on behalf of Defendants Weir, Liebman and Berdahl (d/e 17) is DENIED. The motion for summary judgment on Count I filed on behalf of Defendant Bitzer (d/e 12) is DENIED insofar as it is based on qualified immunity. Insofar as Defendant Bitzer's motion for summary judgment is based on his lack of involvement, the motion is DENIED with leave to renew the motion after discovery relevant to the issue has been conducted. The parties are hereby referred to the magistrate for scheduling purposes.

ENTER: 3 May, 1990.

FOR THE COURT:

/s/ Richard Mills
Richard Mills
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS –
SPRINGFIELD DIVISION

FRANKLIN M. PROPST,	)	
Plaintiff,	)	
v.	)	No. 88-3005
DONALD L. BITZER, et al.,	)	
Defendants.	)	

ORDER

Filed Jan. 31, 1990

RICHARD MILLS, District Judge:

This cause is currently before the Court on motions for summary judgment filed by all Defendants. Plaintiff seeks recovery under 42 U.S.C. §1983 for violation of his first amendment rights.

I – Facts

Plaintiff was, for some twenty years, employed by the University of Illinois in the Computer Based Education Research Laboratory (CERL). During his employment at CERL, Plaintiff was under the direct supervision of Defendant Donald L. Bitzer, who during that time acted as the director of CERL. Plaintiff's actions were apparently also subject to the control of Defendant Morton W. Wei who was vice president and interim chancellor at the university, Defendant Judith S. Liebman, who was a vice chancellor and dean, and Defendant Robert M. Berdahl, who was also a vice chancellor at the university.

During his employment, Plaintiff served as associate director at CERL and was responsible for the negotiation and review of proposed contracts between private entities and the university for the marketing and development of projects created by CERL. Propst alleges that in the course of his employment with the university he discovered that Bitzer had misused and converted funds belonging to the university for his private purpose. Specifically, Propst alleges that Bitzer, the founder and primary shareholder of University Communications, Inc. (UCI), was financing UCI business trips with university funds, and altering university travel vouchers. Propst also alleges that UCI received preferential treatment by the university in several business transactions, and additionally that university personnel were ordered by Bitzer to perform work for UCI.

Propst complained about these expenditures and other improprieties to Defendant Bitzer himself, and then informed others within the university.

The depositions submitted in support and in opposition to the motions for summary judgment reveal that at a meeting in January 1987 the decision to discharge Propst was initially made. A member of Berdahl's staff, and Defendant Bitzer himself, raised the issue at this time whether the firing of Propst could be interpreted as firing a "whistleblower." The university's legal counsel's office indicated that the termination letter, which Defendants proposed to send to Propst, would be "worth a million dollars to him." The Defendants then began an informal investigation which was shortly replaced by a formal audit of CERL.

On November 30, 1987, after the completion of the audit, Propst was transferred from his post as associate director of CERL to a position in the university's physics department. Propst alleges he was placed in an office in a storage area without support staff or adequate facilities, and that this action was in retaliation for the complaints he brought against Bitzer.

II – Summary Judgment Standard

Under Fed. R. Civ. P. 56(c), summary judgment should be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Unquestionably, in determining whether a genuine issue of material fact exists, the evidence is to be taken in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Nevertheless, the rule is also well established that the mere existence of some factual dispute will not frustrate an otherwise proper summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Thus, the "preliminary question for the judge [is] not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it upon whom the *onus* of proof is imposed." *Id.* at 251 (quoting *Improvement Co. v. Munson*, 14 Wall. 442, 448 (1872)); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Applying this standard, the Court now turns to the case at bar.

III – Analysis

Defendants seek summary judgment based upon their qualified immunity to this civil rights action. Qualified immunity is a defense, and the burden of pleading it is upon the defendant. *Gomez v. Toledo*, 446 U.S. 635, 640 (1979). The purpose of the defense is to allow governmental officials to avoid insubstantial claims in the early stages of litigation. This, in turn, should reduce the social costs of §1983 actions by reducing inhibitions against action by governmental officers. *Anderson v. Creighton*, 107 S. Ct. 3034, 3038 (1987). Thus, the qualified immunity doctrine, as fashioned by the Supreme Court, provides governmental officials the opportunity to show that their actions were objectively reasonable at the time performed. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1981).

The question we must resolve is whether the Defendants' acts violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. More specifically, the Court must resolve "the objective (albeit fact-specific) question whether a reasonable [state official] could have believed [the deprivation alleged] to be lawful, in light of clearly established law and the information the [acting state officials] possessed." *Anderson*, 107 S. Ct. at 3040.

Plaintiff has alleged that Defendants, in retaliation for his speaking out to superiors about criminal activities engaged in by his immediate supervisor, and in violation of his first amendment right to free speech, transferred him to a different position with inferior support services on November 30, 1987. At the time these events occurred,

the right of a public employee to speak privately with his employer about matters of public importance was clearly established. *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410 (1979) (extending the rule of *Pickering v. Board of Education*, 391 U.S. 563 (1968), to include protection for private communications between employee and employer). Clearly, the misappropriation of state funds, and preferential treatment of private corporations controlled by state officials, are matters of public concern. *See, e.g., Knapp v. Whitaker*, 757 F.2d 827 (7th Cir. 1985). Thus, the speech involved here was clearly entitled to first amendment protection at the time it was made.

A public employee's right to speak out on matters of public importance is balanced against his employer's interest in effective and efficient public service. *Pickering*, 391 U.S. at 568. If the balancing test formulated in the *Pickering* decision tilts in Defendants' favor, then they may justifiably retaliate against Plaintiff for speaking out. The factors to be considered in this balancing test include: (1) the effect of the Plaintiff's conduct on discipline and harmony among co-workers; (2) the need for confidentiality; (3) whether the conduct impeded the employee in competently performing his daily duties; and (4) the need to encourage a close and personal relationship involving loyalty and confidence between the employee and his superiors. *Conner v. Reinhard*, 847 F.2d 384, 389 (7th Cir. 1988) (citing *Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973)). Because the balancing of factors is involved, we must consider whether any closely analogous case law prior to November 1987 indicated that Propst had a clearly established right to make the statements and accusations he

did without fear of retaliation by his employer. *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir. 1986). In performing the balancing test, the employee's statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose. *Rankin v. McPherson*, 107 S. Ct. 2891, 2898 (1987).

Plaintiff cites the *Rankin* decision in arguing that where the employee serves no confidential, policymaking, or public contact role, the state's interests will rarely, if ever, outweigh the Plaintiff's interest in speaking and the public's interest in knowing. We believe that the *Rankin* decision should not be read so broadly and does not control the case presently before us. In *Rankin*, a 19 year old female employee of a county constable's office made a statement subsequent to the shooting of the President of the United States that "if they go for him again, I hope they get him." This statement was made to her boyfriend in a private room at the constable's office. Upon being informed that the statement was made, McPherson was discharged by her employer. The Supreme Court applied the *Pickering* balancing test and held that because of McPherson's clerical position in the office, the private nature of the statement, and her minimal contact with the public the state's interest in discharging her did not outweigh her rights under the first amendment. *Rankin*, 107 S. Ct. at 2900.

In the case presently before us, Propst served as the associate director of the CERL laboratory. In addition, the statements he made were not of a purely private nature and concerned a matter of extreme public importance, i.e. the misappropriation of public funds. Therefore, we must

now turn to the four factors relevant to the *Pickering* balancing test.

A. Discipline and Harmony

The Defendants assert that Propst's allegations undermined daily operations at CERL and introduced tension which undercut the laboratory's working harmony. In *Ohse v. Hughes*, 816 F.2d 1144 (7th Cir. 1987), *vacated in part*, 108 S. Ct. 1070, *relevant portion reinstated*, 863 F.2d 22 (7th Cir. 1988), a probation officer was discharged after sending written allegations of improper use of public assets, funds and trusts by, and calling for criminal charges against, his immediate supervisor. Ohse brought suit against two counties, the chief probation officer, the state's attorney, and three Illinois circuit judges. The Seventh Circuit stated that the letter may have disrupted the office, undermined his supervisor's authority, and hindered close working relationships in a manner which may be described as inevitable; however, the court believed that the matters the letter addressed were of high public concern and that Ohse was entitled to raise those important issue in the manner in which he did.

In *Conner v. Reinhard*, 847 F.2d 384 (7th Cir. 1988), a city employee brought suit against her supervisor and city alderman after being discharged for speaking out at a public meeting regarding the use of a contingency fund. The Seventh Circuit stated that a public employee has a compelling first amendment interest in pointing out to government officials the misappropriation of public

funds. Furthermore, both the public and government officials have a first amendment interest in being informed of the potential misuse of public funds. After acknowledging that an insubordinate act by a public employee may have undesirable effects on office harmony and discipline, the court stated that to justify discharging a public employee in retaliation for his statements the defendants must provide evidence of actual harmful effects resulting from the alleged insubordination as well as establish that the "potential for office disciplinary problems . . . is . . . sufficiently 'persuasive.' " *Conner*, 847 F.2d at 390.

In support of their argument that Propst's allegations undermined daily operations of CERL, Defendants cite the deposition testimony of Berdahl who stated that it was "clear that we had, I think, a deteriorating situation in terms of the ability of the lab to function with the director and the associate director embroiled in a very vigorous disagreement and with allegations being made against the director by the associate director." Defendants assert that several employees of the CERL laboratory complained to them about the situation between Propst and Bitzer. Furthermore, Defendants argue, that the audit of the laboratory, as well as Propst's statements, caused enormous disruption within the CERL laboratory. However, during the relevant time period, over 100 individuals were employed at the CERL laboratory and the depositions reveal that a large amount of the disruption of the laboratory was due to the audit rather than Propst's statements.

B. Confidentiality

Defendants do not argue that Propst's statements dealt with confidential information, nor is there any evidence that such was the case. As in *Pickering*, 391 U.S. at 572, and *Conner*, 847 F.2d at 390, the Defendants have not shown that Propst was privy to information that was not accessible to the ordinary citizen ordinary citizen or that his position made it difficult for the Defendants to rebut his statements.

C. Performance of Daily Duties

Defendants argue that Propst admitted in his deposition that in June of 1987 it was very difficult for him to function in his administrative position as Bitzer's associate director. In *Knapp v. Whitaker*, 757 F.2d 827 (7th Cir. 1985), the court stated that "[t]he initial, and often determinative, question is whether the speech interferes with the employee's work or with the efficient and successful operation of the office." *Id.* at 842. The court in *Ohse* applied this standard and stated that there was insufficient evidence to conclude that Ohse's speech interfered with his responsibilities at the probation office. The court based this conclusion on the failure of the defendants to provide significant concrete examples of professional incompetence and the lack of evidence that Ohse was unable to get along with the large number of fellow employees at the office.

Similarly, in the case at bar, we believe that there is insufficient evidence to conclude at this point that

Propst's statements interefered [sic] with his responsibilities as associate director of CERL to the degree that the university was justified in transferring him.

D. Loyalty and Confidence

Finally, Defendants argue that Propst's statements discouraged a close personal working relationship between Bitzer and Propst in a situation calling for loyalty and confidence. On this point, we agree with the Defendants. A close personal working relationship is necessary between the director and associate director of a large university department.

In *Hostrop v. Board of Junior College Dist. No. 515*, 471 F.2d 488, 492 (7th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973), the Seventh Circuit cautioned:

> *Pickering* should not be read to authorize the discharge of [a public employee] merely because he expresses an opinion could be interpreted as a sign of disloyalty or an undermining of the confidence placed in him. Instead, *Pickering* holds that an employee's speech may be regulated only if a public entity can show that its functions are being substantially impeded by the employee's statements.

Propst testified in his deposition that he was aware that Bitzer was unhappy with him and that he himself was disappointed in Bitzer. We believe, however, that when the only established disruptive effect of the protected speech is upon the working relationship between the employee and the supervisor accused of the illegal conduct, the plaintiff is entitled to proceed to trial where the employer must establish that its interest in promoting the efficiency of the public service it performs outweighs the

employee's first amendment right to speak. *See Ohse*, 816 F.2d at 1153; *Knapp v. Whitaker*, 757 F.2d 827 (7th Cir. 1985).

The Defendants cite *Maples v. Martin*, 858 F.2d 1546 (11th Cir. 1988), in support of their position that retaliation against Propst for his public statements was justified. In *Maples*, the Eleventh Circuit upheld the district court's entry of judgment notwithstanding the verdict in favor of two university administrators after the jury found that they had violated a tenured professor's first amendment rights by transferring him in retaliation for his protected speech. While the facts of *Maples* are somewhat analogous to the case at bar, the case can be factually distinguished by the fact that the comments made in *Maples* were in the context of a longstanding dispute between the professor and university administrators relating to internal administrative policies of the university. However, we believe the case of *Maples* can be more readily distinguished by the different procedural posture in which it was resolved. In *Maples*, the discharged professor was allowed to proceed to trial where the parties had a chance to fully develop the evidence relating to the discharge. At this point in the instant case, it would be premature to hold that, as a matter of law, the interest of the university in promoting the efficiency of its program outweighed the interest of Propst in speaking out on matters of public concern.

Thus, although Defendants present a strong case for summary judgment, there are genuine issues of material fact relating to the actual effect of Propst's speech on

office discipline and harmony and Propst's ability to perform his duties which will require this case to be presented to a jury.

Ergo, for the foregoing reasons, the motions for summary judgment filed on behalf of the Defendants (d/e 61, 67) are DENIED.

ENTER: 29 January, 1990.

FOR THE COURT:

/s/ Richard Mills
RICHARD MILLS
United States District Judge

In the

United States Court of Appeals

For the Seventh Circuit

No. 90-1168
WILLIAM J. ELLIOTT,

Plaintiff-Appellee,

v.

WILLIAM THOMAS, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 8187 – Brian Barnett Duff, *Judge.*

Nos. 90-2098 and 90-2146
BARBARA PROPST,

Plaintiff-Appellee,

v.

MORTON W. WEIR, *et al.*,

Defendants-Appellants.

Appeals from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 89-8254 – Richard Mills, *Judge.*

ARGUED APRIL 4, 1991 – DECIDED JULY 15, 1991

Before EASTERBROOK and MANION, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge*.

EASTERBROOK, *Circuit Judge*. These cases present a common question of appellate jurisdiction: whether a court's refusal to grant summary judgment to a defendant who denies committing any wrong may be appealed immediately as a "collateral order" on the authority of *Mitchell v. Forsyth*, 472 U.S. 511, 524-29 (1985). To state this question is to answer it. A defense of no wrongdoing is not collateral to the merits; it is the nub of the case. Accordingly, we dismiss two of the appeals. A third is within our jurisdiction, and we conclude that the defendants are entitled to qualified immunity as a matter of law.

William Elliott filed suit under 42 U.S.C. § 1983 contending that the police beat him when they took him into custody. Elliott contends that the beating perforated his eardrum (leaving him with a partial loss of hearing) and broke several teeth. The defendants moved for summary judgment, submitting affidavits and medical records that, they contend, show that Elliott's injuries (if any) predated the arrest, and that he suffered no new hurt at their hands. The district court concluded that there is a genuine dispute about what happened to Elliott when he was arrested, and it set the case for trial. 1990 U.S. Dist. LEXIS 711 (N.D. Ill.). The defendants have appealed.

Barbara Propst, formerly the Assistant Director of the Computer-based Education and Research Laboratory at the University of Illinois, sued under § 1983 contending that her transfer to Assistant Dean in the College of Applied Life Sciences penalized her for speech that she believes protected by the first amendment. Propst

reported to administrators of the University that Donald L. Bitzer, then Director of the Laboratory, had a conflict of interest because he was acquiring goods and services for the Laboratory through corporations in which he had an ownership interest. The University commissioned an audit, which interfered with normal activities of the Lab. The three officials responsible for Propst's transfer – Chancellor Morton W. Weir and Vice-Chancellors Judith S. Liebman and Robert M. Berdahl – contend that they acted to promote efficient operation in the Lab, impossible with the Director and his two chief aides (Barbara Propst and her husband Franklin, then Associate Director of the Lab) at each other's throats. Bitzer contends that he had nothing to do with the transfer – that he did not know of the Propsts' complaints, did not know why the University was running a detailed audit, and never asked higher-ups to do anything about the Propsts. The district court denied the defendants' motions for summary judgment, and all four have appealed.

I

The defense of qualified immunity articulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and amplified in *Anderson v. Creighton*, 483 U.S. 635 (1987), gives public officials the benefit of legal doubts. An official who does not violate law "clearly established" at the time, 457 U.S. at 818, is entitled not only to prevail, but to prevail before trial. Qualified immunity, we know from *Mitchell*, establishes a right not to be tried. When rules of law clearly establish public officials' duty, the immunity defense is unavailable. So, too, the interlocutory appeal to vindicate the right not to be tried is unavailable when there is no

legal uncertainty; there is no separate "right not to be tried" on the question whether the defendants did the deeds alleged; that is *precisely* the question for trial.

By sleight of hand you can turn any defense on the merits into a defense of qualified immunity. Consider this possibility of the police officers Elliott has sued: It was not "clearly established" in May 1986, when we arrested Elliott, that police officers could be liable for taking peaceable custody of a suspect; the district court proposes to hold a trial at which the only outcome favorable to plaintiff (given the uncontroverted evidence that Elliott suffered no injury) would be a holding that police *are* liable for making arrests that cause no injury; that would be a change of law, which we cannot be expected to forecast; therefore we are entitled to qualified immunity. The parenthetical expression carries the entire weight of this "argument": if you allow the possibility that the suspect will show injury at trial, then the defendants may be held liable under the law as it existed in 1986. So the claim to immediate appellate review collapses to the argument that the "right not to be tried" can be vindicated only if the court of appeals combs through the factual record. Yet that is miles away from the position of *Harlow, Mitchell,* and *Anderson,* which describe qualified immunity as a defense contingent on the state of the law.

To say that the question on appeal under *Mitchell* is the state of the law when the defendants acted is not to say that current law is irrelevant. *Siegert v. Gilley,* 111 S. Ct. 1789 (1991), holds that a court of appeals may, sometimes must, answer the question whether it was clearly

established on a given date that particular conduct violates the Constitution by replying: "Why, that is not established even today; if defendants did everything the plaintiffs alleged, still they did not violate the Constitution." Deciding just *when* it became "clearly established" that public officials could not do something that the Constitution allows them to do is silly. Our defendants do not say, however, that the Constitution today allows police to beat suspects, or allows university administrators to discriminate against business officials on account of speech.

Facts too play a role in *Mitchell* appeals. It is impossible to know which "clearly established" rules of law to consult unless you know what is going on. *Auriemma v. Rice*, 910 F.2d 1449, 1455 (7th Cir. 1990) (in banc). *Bonitz v. Fair*, 804 F.2d 164 (1st Cir. 1986), went overboard in holding that the court of appeals must look exclusively to the allegations of the complaint, so that it will not be tainted by the facts in assessing "clearly established" law. *Unwin v. Campbell*, 863 F.2d 124, 130-33 (1st Cir. 1988), overrules *Bonitz* and holds that the court of appeals may consult the full record – viewed as Fed. R. Civ. P. 56 requires, in the light most favorable to the party opposing the motion for summary judgment. *Green v. Carlson*, 826 F.2d 647 (7th Cir. 1987), puts us on the side of Unwin, as is every other court of appeals. The fifth circuit flirted with *Bonitz* in *Jefferson v. Ysleta Independent School District*, 817 F.2d 303, 305 (5th Cir. 1987), but retreated in *Geter v. Fortenberry*, 849 F.2d 1550, 1559-60 (5th Cir. 1988). For a smattering of other cases see *Brown v. Grabowski*, 922 F.2d 1097, 1110-11 (3d Cir. 1990); *Turner v. Dammon*, 848 F.2d 440, 444 (4th Cir. 1988); *Poe v. Haydon*, 853 F.2d 418, 425 (6th Cir. 1988);

DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714, 719 (10th Cir. 1988).

Yet the *reason* a court of appeals examines the facts is to determine whether it was "clearly established" at the time that such deeds were forbidden. *Anderson*, 483 U.S. at 641. It would extend *Mitchell* well beyond its rationale to accept an appeal containing nothing but a factual issue. We have expressed concern that being too ready to entertain interlocutory appeals on immunity grounds would increase the expense plaintiffs must bear, and the delay they must endure, to vindicate their rights. *Abel v. Miller*, 904 F.2d 894, 396 (7th Cir. 1990); *Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989). If a general defense on the merits supports interlocutory appeal, then every public defendant is entitled to pretrial appellate decision. *Mitchell* did not create a general exception to the finality doctrine for public employees. Every court that has addressed the question expressly has held that *Mitchell* does not authorize an appeal to argue "we didn't do it". *Kaminsky v. Rosenblum*, 929 F.2d 922 (2d Cir. 1991); *Ryan v. Burlington County*, 860 F.2d 1199, 1203 & n.8 (3d Cir. 1988); *Lion Boulos v. Wilson*, 834 F.2d 504, 509 (5th Cir. 1987); *Velasquez v. Senko*, 813 F.2d 1509, 1511 (9th Cir. 1987). We join them.

Bitzer does not contend that he acted in the shadow of legal uncertainty. He submits, rather, that he did not know about and had nothing to do with the events of which Propst complains. His appeal, No. 90-2146, is unrelated to qualified immunity and is dismissed for want of jurisdiction.

The four defendants in Elliott's case make at least a stab at presenting a legal issue. *Gumz v. Morrissette*, 772 F.2d 1395, 1400 (7th Cir. 1985), says that excessive force during an arrest violates the due process clause only if acts that shock the conscience produce severe injury. We overruled the subjective approach in *Lester v. Chicago*, 830 F.2d 706 (7th Cir. 1987), in favor of the objective reasonableness standard of the fourth amendment. *Graham v. Connor*, 490 U.S. 386 (1989), holds that *Lester* got it right. *Titran v. Ackman*, 893 F.2d 145 (7th Cir. 1990), made it clear that *Graham* also abrogated the significant-injury component of *Gumz* – although not all courts agree with our conclusion. See *Hudson v. McMillian*, 111 S. Ct. 1579 (1991), granting certiorari to review the significant-injury rule still enforced in the fifth circuit. See *Johnson v. Morel*, 876 F.2d 477 (5th Cir. 1989) (in banc). Defendants contend that they were entitled to the benefits of *Gumz* when they arrested Elliott in 1986. The difficulty is that this legal debate has nothing to do with their defense – that they did not injure Elliott at all. If they punctured Elliott's eardrum without provocation, as Elliott contends, then Elliott recovers under any standard; if the defendants did nothing, as they say, then they prevail under any standard. Legal uncertainty plays no role. Moreover, *Gumz* had limited the circumstances under which persons could recover damages, which is distinct from defining lawful conduct. See *Kurowski v. Krajewski*, 848 F.2d 767, 774-75 (7th Cir. 1988). No reasonable police officer would have thought that *Gumz* condoned cuffing a suspect in the ear (the act Elliott says punctured his eardrum). The only substantial questions are whether the officers did what they are accused of and, if they did, whether these acts

injured Elliott. As such questions are outside our jurisdiction, we dismiss appeal No. 90-1168.

II

The Chancellor and Vice-Chancellors of the University of Illinois knew about the Propsts' complaints. Unlike Bitzer, these three officials present a genuine immunity defense: that the law had not clearly established the impropriety of transferring a public employee whose speech created a disturbance undermining the productivity of other workers. Propst's constitutional claim depends on *Pickering v. Board of Education*, 391 U.S. 563 (1968), which establishes a balancing approach. Public employers may consider disruptive speech under some circumstances, but not all. Legal ambiguity in the wake of *Pickering* sets the stage for immunity. See *Greenberg v. Kmetko*, 922 F.2d 382 (7th Cir. 1991); cf. *Thulen v. Bausman*, 930 F.2d 1209 (7th Cir. 1991).

Berdahl contends that he began receiving reports that important members of the staff thought that the work of the Laboratory was in jeopardy and were looking for other employment. Two groups of employees visited Berdahl to voice their concerns about deteriorating relations between Bitzer and the Propsts. Weir received letters reporting that the Lab was in "bad shape". Weir, Berdahl, and Liebman submit that they decided that either Bitzer or the Propsts had to go if the Laboratory was to return to normal. When in the fall of 1987 the auditors submitted a report that the administrators interpreted as absolving Bitzer of any material conflicts, the administrators decided to move the Propsts. They transferred Barbara to

an administrative position in the College of Life Sciences, and Franklin returned to the Physics Department, where he was a tenured professor. Neither transfer involved loss of pay or rank within the University. Such transfers, the administrators submit, are justified to deal with a demonstrated disruption in working conditions. E.g., *Breuer v. Hart*, 909 F.2d 1035, 1039-40 (7th Cir. 1990); *Knapp v. Whitaker*, 757 F.2d 827, 842-43 (7th Cir. 1985). At all events, they submit that this case is sufficiently close to the line that they are entitled to immunity – which "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Barbara Propst does not deny that the three administrators received reports of growing dissention, of diversion of time from the Lab's work, and of plans to leave unless something were done. She maintains, however, that conditions in the Lab were not nearly as bad as the administrators were led to believe (she submits that things were hunky-dory), that any disruption was caused by the audit rather than by conflict among the managers, and that the administrators' true intent was to retaliate on account of her speech rather than to facilitate the educational mission of the Laboratory. She demands additional discovery to pursue these avenues.

When denying the administrators' motion for summary judgment against Franklin Propst, the district court concluded that the cause and extent of breakdown in the Lab's functioning are genuine issues of material fact. The court adopted that reasoning without further elaboration in Barbara Propst's case. Yet the question is not what the

conditions in the Laboratory *were;* it is what the administrators reasonably believed them to have been. *Anderson,* 483 U.S. at 641; *Davis v. Jones,* No. 90-2336 (7th Cir. July 11, 1991). Objectively reasonable but mistaken conclusions do not violate the Constitution. If we assume that the staffers who visited and wrote to the administrators were lying, this does not establish that the administrators' actions were unreasonable, given the information in their possession. Conditions in the Laboratory are not relevant; the inquiry must focus on what the defendants knew, and whether reasonable persons in their position would have believed their actions proper given the state of the law in 1987.

That conclusion takes us straight to Barbara Propst's second argument, and a conundrum. She wants discovery and a trial to probe the defendants' mental processes: did they really rely on the reports, as they say, or were they out to penalize her speech, as she suspects? Yet *Harlow* eliminated the subjective component from official immunity (formerly "good faith immunity", a telling phrase) because searching for intent and other components of knowledge blocks the use of immunity as a shortcut to decision. 457 U.S. at 814-19; *Cleavinger v. Saxner,* 474 U.S. 193, 208 (1985). Official immunity creates a "right not to be tried"; yet if by arguing that the defendants acted with forbidden intent the plaintiff may obtain exhausting discovery and trial, the promise of a "right not to be tried" is a hoax. Carrying out the program of *Harlow* seems to imply attributing to the defendants the best intent they (objectively) could have under the circumstances, and asking whether the law at the time clearly establishes that persons with such an intent violate the Constitution. Yet

that would be the functional equivalent of eliminating all recoveries when a mental state is part of the definition of the wrong – as it is in cases of racial discrimination, excessive punishment, and many other constitutional torts. *E.g. Wilson v. Seiter*, 59 U.S.L.W. 4671 (U.S. June 17, 1991) (cruel and unusual punishments clause); *Daniels v. Williams*, 474 U.S. 327 (1986) (due process clause); *Washington v. Davis*, 426 U.S. 229, 238-48 (1976) (equal protection clause). How is it possible simultaneously to preserve remedies for egregious wrongdoing and nip in the bud efforts to prolong the agony of defendants who are fated to win under *Harlow*?

Auriemma gives part of the answer. We rejected the invitation to impute to official actors the best motives they could have. *Auriemma* adopts the approach of *Wade v. Hegner*, 804 F.2d 67, 69-70 (7th Cir. 1986), which distinguishes the role of intent in defining the violation from the role of intent in ascertaining whether particular conduct was clearly unlawful at the time. 910 F.2d at 1452-53. When intent is one of the substantive elements of a constitutional wrong, the plaintiff is entitled to an adequate opportunity to establish that the defendant acted with the proscribed intent. Whether the defendant knew of and defied the governing legal standards – that is, whether the defendant exhibited "good faith" – is irrelevant under *Harlow*. See also *Rakovich v. Wade*, 850 F.2d 1180, 1210 (7th Cir. 1987) (in banc). Other courts of appeals follow the same approach. E.G. *Hobson v. Wilson*, 737 F.2d 1, 29-30 (D.C. Cir. 1984).

What *Auriemma* and like cases leave unanswered is the question how it is then possible to comply with *Harlow's* directive that "[u]ntil this threshold immunity

question is resolved, discovery should not be allowed." 457 U.S. at 818. The Supreme Court granted certiorari in *Siegert v. Gilley* to address that question but ducked, concluding that the plaintiff had not stated a claim on which relief may be granted. Although the Court avoided decision for the moment, we can not. Like Justice Kennedy, see *Siegert*, 111 S. Ct. at 1795 (concurring opinion), we think that the best solution to the conundrum is to require the plaintiff to produce "specific, nonconclusory factual allegations which establish [the necessary mental state], or face dismissal." Unless the plaintiff has the kernel of a case in hand, the defendant wins on immunity grounds in advance of discovery. A series of cases adopt and elaborate on this approach. *Siegert v. Gilley*, 895 F.2d 797, 800-02 (D.C. Cir. 1990); *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425, 1435-36 (D.C. Cir. 1987); *Halperin v. Kissinger*, 807 F.2d 180, 186-87 (D.C. Cir. 1986) (Scalia, J.); *Hobson*, 737 F.2d at 29-31; *Collinson v. Gott*, 895 F.2d 994, 1001-03 (4th Cir. 1990) (Phillips, J.), and 1011-12 (Butzner, J.); *Elliott v. Perez*, 751 F.2d 1472, 1482 (5th Cir. 1985); *Myers v. Morris*, 810 F.2d 1437, 1453-54 (8th Cir. 1987); *Sawyer v. County of Creek*, 908 F.2d 663, 665-68 (10th Cir. 1990); *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 647-50 (10th Cir. 1988). We do not rehash the arguments, but two subjects call for brief discussion. One is straightforward. Although the court of appeals' opinion in *Siegert* insisted, 895 F.2d at 803-04, that the plaintiff produce "direct" evidence of the defendant's improper intent, we agree with Justice Kennedy that there is no principled difference between direct and circumstantial evidence. See *Holland v. United States*, 348 U.S. 121, 140 (1954). Requiring "direct" evidence of intent

would be fatal in all but the rare case in which the defendant confessed. The other subject is a bit more complex.

Judge Higginbotham, concurring in *Elliott*, 751 F.2d at 1482-83, expressed concern that what *Hobson* dubbed a "heightened pleading requirement" is inconsistent with the Rules of Civil Procedure. Rule 8 establishes a system of notice rather than fact pleading; Rule 9(b) says that motive and intent may be pleaded generally; Rule 56 requires a court acting on a motion for summary judgment to draw all reasonable inferences favorable to the party opposing the motion. A "heightened pleading requirement" in constitutional cases appears to conflict with all three rules. The Acting Solicitor General's brief in *Siegert* dealt with this by arguing that to the extent the rules hinder the immunity defense, they abridge a substantive right and so exceed the scope of the Rules Enabling Act, 28 U.S.C. § 2072(b). Brief for the Respondent at 25. Yet it is hard to depict a "right not to be tried" as substantive; it sounds distinctly procedural. The substantive right belongs to the plaintiff. It is better, we think, to recognize that official immunity is an affirmative defense, which need be asserted only after a plaintiff gets past the (slight) hurdles established by Rules 8 and 9(b). A possibility that the defendants will claim immunity does not require the plaintiff to anticipate and plead around that defense. *Gomez v. Toledo*, 446 U.S. 635 (1980). Defendants assert immunity by pleading it in the answer and moving for summary judgment.

Because *Gomez* holds that the complaint need not anticipate an immunity defense, it is misleading to speak of a "heightened *pleading* requirement". Nothing we say

here affects what the plaintiff must put in the complaint. Only Rule 56 remains for consideration. Rule 56 does not specify how much discovery should be allowed before the court acts; Rule 56(b) says that a defendant may move for summary judgment "at any time", authorizing motions in advance of discovery. Whether the district judge should allow discovery before acting on the motion depends on the governing law. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). If a rule of law crafted to carry out the promise of *Harlow* requires the plaintiff to produce some evidence, and the plaintiff fails to do so, then Rule 56(c) allows the court to grant the motion for summary judgment without ado. Cases such as *Hobson* therefore do not conflict with the rules – and to make this clear we deprecate the expression "heightened pleading requirement" and speak instead of the minimum quantum of proof required to defeat the initial motion for summary judgment.

In *Auriemma* the defendant gave plaintiff all the ammunition necessary to avoid summary judgment. After demoting many white police officers and promoting black officers over them, the chief of police denied having an affirmative action plan – which supported an inference that the chief had an improper intent and was not confused by the perplexing state of the law concerning affirmative action. The top administrators of the University of Illinois have not handed Propst her case on a platter. They contend that they acted solely to promote the efficient operation of an important part of their university.

Barbara Propst offers no reason other than her own suspicions to doubt the administrators' account of their reasons. Her husband's parallel case has produced substantial discovery; she does not argue that any of the discovery in that case undercuts the administrators' explanation. Barbara Propst has not produced "specific, nonconclusory factual allegations", *Siegert*, 111 S. Ct. at 1795 (Kennedy, J., concurring), that the administrative defendants sought to punish her on account of speech and disregarded other considerations. The state of the law on mixed-motive transfers was in 1987 – and remains – sufficiently ambiguous that the three administrators are entitled to immunity. See *Rakovich*, 850 F.2d at 1213.

Appeals No. 90-1168 and 90-2146 are dismissed for want of jurisdiction. On the administrators' appeal, No. 90-2093, the judgment is reversed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

September 4, 1991.

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

WILLIAM J. ELLIOTT, *Plaintiff-Appellee,* No. 90-1168 v. WILLIAM THOMAS, et al., *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 86 C 3137 Brian Barnett Duff, *Judge.*
BARBARA PROPST, *Plaintiff-Appellee,* No. 90-2093 v. MORTON W. WEIR, et al., *Defendants-Appellants.*	Appeal from the United States District Court for the Central District of Illinois, Springfield Division. No. 89-3254 Richard Mills, *Judge.*

Order

In No. 90-1168 Defendants-Appellants, and in No. 90-2093 Plaintiff-Appellee, filed petitions for rehearing and suggestions of rehearing en banc on July 29, 1991. No judge in regular active service has requested a vote on the suggestions of rehearing en banc, and all of the judges on

the panel have voted to deny rehearing. The petitions for rehearing are therefore DENIED.

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Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

42 USCS § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.